tiffs. The dictum of Geoffrey Lane LJ in the above case was adopted by the Federal Court in *Sivaperuman* v *Heah Seok Yeong Realty Sdn Bhd.*[26] Prior thereto Abdoolcader J, as he then was, in *Wah Loong (Jelapang) Tin Mine Sdn Bhd* v *Chia Ngen Yiok*[27] at p 114 issued the same warning, namely, that a mandatory injunction is never granted before trial save in exceptional and extremely rare cases.

The plaintiffs in seeking the mandatory injunction wanted the defendant forthwith to take over the conduct of the divisional election and again forthwith to conduct such election to elect the 1990 divisional office bearers and national delegates to the annual general assembly. At the same time their counsel conceded that it would be wrong to carry out the Muar divisional elections with fictitious members on the register. Inasmuch as the plaintiffs were seeking the mandatory injunction, the onus was on them to demonstrate to the court by evidence that the injunction if granted was reasonably capable of being carried out, and forthwith at that, yet only after eradicating the problem of phantom and unlawful members. The plaintiffs produced no such evidence.

As to the alternative injunction sought, the decision to hold the election at the annual general assembly on 28 and 29 July is a decision which has not been challenged by the plaintiffs. Counsel for the plaintiffs expressly said so. Accordingly, the provisions of s 18C apply and it would seem that the court has no jurisdiction to deal with the matter in this regard. The plaintiffs however persist. They say that notwithstanding that validity of the decision is not questioned the election should be postponed. I do not see how the court can order so without flying in the face of the section.

At the eleventh hour and faced with the provisions of art 167, the plaintiffs applied to amend the summons seeking to restrain the association from preventing the plaintiffs and the duly elected 1987 national delegates from the Muar division from attending the annual general assembly of the association to be held on 28 and 29 July 1990 and to exercise their rights as national delegates at the general assembly and election. The application was opposed as coming too late. I agree. The application to amend is refused. But the plaintiffs should have leave to bring a fresh application if they deem fit and I order accordingly.

For the reasons abovestated the plaintiffs' interlocutory summons for injunctions is dismissed with costs to be taxed.

Applications dismissed.

Solicitors: *Yeoh Poh San & Co; Mah Kok & Din.*

Reported by *Zarinah Marican*

Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors

HIGH COURT (KUCHING) — SUIT NO KG 256 OF 1988
HAIDAR J
25 JUNE 1990

Civil Procedure — Representative action — Whether action fell within ambit of O 15 r 12(1) of the Rules of the High Court 1980 — Tests to be satisfied — Rules of the High Court 1980, O 15 r 12(1)

Limitation — Action taken against act of public officers — Limitation period 36 months next after act complained of — Act complained of occurred in 1951 — No attempt to enforce legal rights — No reasons given for delay in instituting action — Public Authorities Protection Act 1948, s 2

Civil Procedure — Pleadings — Statute of limitations pleaded as defence but defence not delivered — Defendants merely alleging no reasonable cause of action — Action to be struck out if claim time-barred

The plaintiffs are claiming on behalf of themselves and all other proprietors of native customary land, situated at Kampong Uma Bawang, Sarawak, that the third defendant wrongfully granted a timber licence to the second defendant for the taking of forest produce from portions of land which they claimed includes their native customary land.

The third defendant's predecessors had, in August 1951, issued a proclamation under s 29 of the then Forest Ordinance 1934 constituting the land enclosed within indicated boundaries a protected forest known as Lemiting Protected Forest ('LPF'), subject to the rights, privileges and special conditions governing the protection of the communities to farm their secondary forest ('temuda') as specified. The timber licence covers the forest area in the LPF which the defendants claim is state land. The defendants now apply to strike out the plaintiffs' action under O 18 r 19 of the Rules of the High Court 1980. The plaintiffs have applied to reamend their writ and statement of claim to fully indicate the representative action of the plaintiffs.

The court proceeded on two main issues:

(i) whether the action should or can proceed as a representative action;
(ii) whether the plaintiffs' claims for the declaratory orders are barred by limitation.

Held, allowing the defendants' applications:

(1) For an action to be properly constituted as a representative action under O 15 r 12(1) of the Rules of the High Court 1980, it must be shown that all the members of the alleged class have a common interest, that all have a common grievance and that the relief is in its nature beneficial to them all.

(2) In this case, the plaintiffs have filed the action as a representative of the Kayan community which is a native race specified in the schedule to the Interpretation Ordinance. Native customary rights are recognized by the Land Code of Sarawak (Cap 81) and under s 2 of the Code, if the native customary rights were established as at 1 January 1958, such rights shall subsist. The plaintiffs have therefore satisfied the test of common interest.

(3) The proclamation deprived the Kayans as a community of their alleged customary rights over the land proclaimed. Given the relevant provisions of the Land Code, if any member of the community can establish their native customary rights, then such rights are protected by law and if they can show an

infringement of these rights, then the Kayan native having such rights will have the benefits of a successful claim.

(4) A plaintiff suing in a representative capacity does not have to obtain the consent of those whom he purports to represent and the fact that there are two opposing factions within the Kayan community does not prevent this action from being a representative action.

(5) Where it is clear that the defendant was going to rely on the statute of limitations and there was nothing before the court to suggest that the plaintiffs could escape from it, the claim would be struck out.

(6) Any action taken to challenge the act done by public officers pursuant to written law or in the execution of their public duty must be done within 36 months next after the act complained of, in this case the issue of proclamation in respect of the LPF and the issue of the timber licence.

(7) No attempt was made by the plaintiffs to enforce any legal rights over the alleged area for the alleged acts of dispossession until the filing of the present suit. Section 2(a) of the Public Authorities Act 1948 seems to show that the plaintiffs' suit is statute-barred.

(8) No reasons were also given for the delay in their action and the first plaintiff's affidavit shows that they were aware of the proclamation as far back as the 1960s.

(9) On the issue of trespass, the first defendant had been allowed onto the temuda land, and the illegality of the agreement is irrelevant to the issue whether the entry onto the temuda land of the plaintiffs was without justification or lawful authority of the owners. Since the plaintiffs' claim for declarations that the LPF and the timber licence is invalid is statute-barred, the issue of trespass is inapplicable.

[Bahasa Malaysia summary

Plaintif-plaintif sedang menuntut bagi pihak diri mereka sendiri dan semua tuanpunya tanah adat penduduk asli, yang terletak di Kampong Uma Bawang, Sarawak bahawa defendan ketiga telah dengan salahnya memberi lesen membalak kepada defendan kedua untuk mengambil hasil-hasil hutan daripada bahagian tanah di mana mereka tuntut meliputi tanah adat penduduk asli mereka.

Pada bulan Ogos 1951, pendulu defendan ketiga telah mengeluarkan suatu pengisytiharan di bawah s 29 Ordinan Hutan 1934 pada masa itu, menjadikan tanah yang termasuk di dalam sempadan yang ditanda suatu hutan yang dilindungi dan dikenali sebagai Lemiting Protected Forest ('LPF'), tertakluk kepada hak-hak istimewa dan syarat-syarat khas menguasai perlindungan masyarakat itu berkebun di hutan temuda yang dinamakan. Lesen membalak juga meliputi kawasan hutan di LPF yang defendan tuntut adalah tanah kerajaan. Sekarang defendan memohon untuk membatalkan tindakan plaintif di bawah A 18 k 19 Kaedah Mahkamah Tinggi 1980. Plaintif memohon untuk meminda sekali lagi writ dan pernyataan tuntutan untuk menunjukkan dengan sempurna tindakan perwakilan plaintif itu.

Mahkamah meneruskan atas dua isu utama:
(i) samada tindakan itu seharusnya atau boleh diteruskan sebagai tindakan perwakilan;
(ii) samada tuntutan plaintif untuk perintah-perintah deklarasi itu dihalang oleh had masa.

Diputuskan, membenarkan permohonan defendan:

(1) Untuk suatu tindakan dijadikan tindakan perwakilan secara sahnya di bawah A 15 k 12(1) Kaedah Mahkamah Tinggi 1980, mestilah ditunjukkan bahawa semua ahli-ahli mempunyai kepentingan bersama, bahawa semuanya mempunyai kilanan yang sama dan bahawa relif itu dalam sifatnya, sesuatu yang berfaedah kepada mereka semua.

(2) Dalam kes ini, plaintif telah menfail tindakan ini sebagai wakil kepada masyarakat Kayan yang merupakan kaum orang asli, yang dinyatakan dalam jadual kepada Ordinan Tafsiran. Hak adat orang asli adalah diiktiraf oleh Kanun Tanah Sarawak (Cap 81) dan di bawah s 2 Kanun itu jika hak-hak adat orang asli itu dibentuk pada 1 Januari 1958, hak-hak itu mestilah dikekalkan. Oleh itu, plaintif telahpun memuaskan ujian kepentingan bersama.

(3) Pengisytiharan melucutkan orang-orang Kayan sebagai satu masyarakat daripada hak-hak adat mereka atas tanah-tanah yang diisytiharkan itu. Atas peruntukan relevan Kanun itu, jika sesiapa ahli masyarakat itu boleh membuktikan hak adat orang asli mereka, maka hak-hak itu akan dilindungi oleh undang-undang dan jika mereka boleh menunjukkan perlanggaran hak-hak itu, maka orang asli Kayan yang mempunyai hak-hak itu akan menikmati faedah tuntutan yang berjaya.

(4) Seseorang plaintif yang menuntut dalam kedudukannya sebagai wakil tidak perlu memperolehi kebenaran mereka yang dia dianggap mewakili dan fakta bahawa terdapatnya dua belah pihak yang menentang di dalam masyarakat Kayan tidak menghalang tindakan ini daripada dijadikan tindakan perwakilan.

(5) Di mana adalah terangnya bahawa defendan akan bergantung kepada statut had masa dan tidak ada apa-apa pun di hadapan mahkamah yang boleh menunjukkan bahawa plaintif boleh mengatasinya, maka tuntutan itu akan dibatalkan.

(6) Sebarang tindakan yang diambil untuk mencabar sesuatu yang dilakukan oleh pegawai-pegawai awam yang mengikut perundangan bertulis atau dalam perlaksanaan kewajipan awam mereka mestilah dibuat dalam tempoh 36 bulan selepas kelakuan yang diadukan itu, dalam kes ini isu pengisytiharan mengenai LPF dan isu lesen membalak.

(7) Tidak ada percubaan dibuat oleh plaintif untuk menguatkuasakan sebarang hak-hak undang-undangnya di atas kawasan yang diperkatakan di mana kelakuan yang melucutkan possessi berlaku sehinggalah tindakan ini difail.

(8) Tidak ada alasan diberi untuk kelengahan dalam tindakan mereka dan afidavit plaintif pertama menunjukkan bahawa mereka telah sedar tentang pengisytiharan itu seawal tahun enam puluhan.

(9) Atas isu pencerobohan, defendan pertama telah dibenarkan memasuki tanah temuda, dan ketidaksahan perjanjian adalah tidak relevan kepada isu samada kemasukan ke dalam tanah temuda kepunyaan plaintif itu adalah tanpa kebenaran atau kuasa undang-undang tuanpunyanya. Oleh kerana tuntutan plaintif untuk deklarasi bahawa LPF dan lesen membalak itu adalah tidak sah sudahpun dihalang oleh had masa, maka isu trespas juga tidak terpakai.]

[*Editorial Note*: The plaintiffs have appealed to the Supreme Court vide Civil Appeal No 01-54 of 1990.]

Cases referred to

1 *Wenlock* v *Moloney* [1965] 1 WLR 1238 (refd)
2 *Tractors (M) Bhd* v *Tio Chee Hing* [1975] 2 MLJ 1 (refd)
3 *A-G of Duchy of Lancaster* v *L & NW Ry Co* [1892] 3 Ch 274 (refd)
4 *Nagle* v *Feilden* [1966] 2 QB 633 (folld)
5 *Drummond-Jackson* v *British Medical Association* [1970] 1 WLR 688 (folld)
6 *Davey* v *Bentinck* [1893] 1 QB 185 (folld)
7 *Moore* v *Lawson* (1915) 31 TLR 418 (folld)

8 *Smith* v *Cardiff Corp* [1953] 2 All ER 1373 (folld)
9 *Bedford (Duke)* v *Ellis* [1901] AC 1 (folld)
10 *John* v *Rees* [1969] 2 All ER 274 (folld)
11 *J Bollinger SA* v *Goldwell* [1971] RPC 412 (refd)
12 *Dismore* v *Milton* [1938] 3 All ER 762 (refd)
13 *Riches* v *DPP* [1973] 2 All ER 935 (folld)
14 *Saw Seng Kee* v *Director of Lands and Mines, Penang* [1987] 1 MLJ 80 (folld)
15 *Ara bte Aman & Ors* v *Superintendent of Lands and Mines 2nd Div* [1975] 1 MLJ 208 (folld)
16 *Tio Chee Hing & Ors* v *Govt of Sabah* [1981] 1 MLJ 207 (folld)
17 *Haji Hussin bin Hj Ali & Ors* v *Datuk Hj Mohamed bin Yaacob & Ors* [1983] 2 MLJ 227 (folld)

Legislation referred to
Land Code (Sarawak) (Cap 81) ss 2, 5, 15
Public Authorities Protection Act 1948 s 2(a)
Rules of the High Court 1980 O 15 r 12, O 18 r 19

Gurdial S Nijar (*MS Sandhu* and *Baru Bian* with him) for the plaintiffs.
JC Fong (*HC Sim* with him) for the first and second defendants.
Abdul Razak Tready (Ag Deputy State Attorney-General) for the third defendant.

Cur Adv Vult

Haidar J: The plaintiffs, by way of a representative action, filed this writ as amended pursuant to O 20 r 1 of the Rules of the High Court 1980 ('RHC') (encl 4) and sought the following:

(1) A declaration that the plaintiffs have native customary rights over their land.
(2) A declaration that this right precludes the third defendant from impairing or abridging the plaintiffs' rights.
(3) A declaration that the proclamation dated 1 August 1951 (LN 188 of 1951), in so far as it impairs the plaintiffs' customary rights over their land as well as to take forest produce, is bad.
(4) A declaration that the third defendant is precluded from issuing any licence which affects the plaintiffs' said rights.
(5) A declaration that s 90B of the Forest Ordinance (Cap 126) is void.
(6) A declaration that the impairing of the plaintiffs' rights constitutes a violation of art 8 of the Federal Constitution (equality before the law).
(7) A declaration that the act of the third defendant in issuing the said licence is void and/or wrongful.
(8) A declaration that the issuance of the licence constitutes a violation of art 13 of the Federal Constitution (no confiscation of property without adequate compensation).
(9) A declaration that the issuance of the licence constitutes a violation of art 5 of the Federal Constitution (no person to be deprived of his life, except in accordance with law).
(10) A declaration that the said contract between the first and second defendants is illegal as it is in breach of ss 2(2), 49(2) and 51(4) of the Forest Ordinance (Sarawak) (Cap 126).
(11) A declaration that the first defendant and/or its agents or servants are trespassing on the plaintiffs' customary land and/or otherwise unlawfully interfering with the plaintiffs' rights over the land.
(12) A declaration that the plaintiffs are entitled to vacant possession of the plaintiffs' customary land.
(13) A prohibitory injunction restraining the first and second defendants and/or their agents or servants from trespassing, entering or using the plaintiffs' customary land.
(14) A mandatory injunction against the first and second defendants to cease operations and remove all structures from the plaintiffs' customary land.
(15) Damages.
(16) Costs.
(17) Such further or other relief as this court deems just.

Consequent upon the filing of this writ by the plaintiffs, six applications were filed by both the plaintiffs and the defendants, viz:

(i) summons-in-chambers dated 19 August 1989 (encl 17) by the first and second defendants under O 18 r 19(1)(a), (b) and (d) and O 92 r 4 of RHC for striking out the plaintiffs' writ and statement of claim or in the alternative in respect of the first defendant, paras 1 to 14 (both inclusive of the indorsement to the amended writ of summons) and paras 4 to 13 of the amended statement of claim as well as prayers 1 to 14 be struck out;
(ii) summons-in-chambers dated 22 August 1989 (encl 19) by the third defendant under O 18 r 19(1)(a), (b) and (d) and O 92 r 4 of RHC for striking out the plaintiffs' amended writ and amended statement of claim;
(iii) summons-in-chambers dated 18 September 1989 (encl 22) by the plaintiff under O 29 of RHC for interim injunction;
(iv) summons-in-chambers dated 2 November 1989 (encl 39) by the plaintiffs under O 20 r 5 of RHC for reamendments;
(v) summons-in-chambers dated 9 March 1990 (encl 59) under O 20 r 5 of RHC by the plaintiffs for reamendments;
(vi) summons-in-chambers dated 17 March 1990 (encl 63) under O 20 r 8 of RHC by the third defendant for additional grounds to be added to its earlier summons-in-chambers (encl 19).

On 9 December 1989, Madam Jagjeet Kaur Sandhu, counsel for the plaintiffs, withdrew the summons-in-chambers (encl 39) with liberty to file. Counsel for the first, second and third defendants did not object to the

application and I accordingly struck out encl 39 with liberty to file. It was agreed then that the application for reamendment to be filed by the plaintiffs and the applications to strike out the plaintiffs' action by all the defendants be heard together as the issue of representative action is relevant for argument in both applications and the matter was adjourned to 26 and 27 March 1990 for hearing.

At the subsequent hearing on 26 March 1990, the following matters were agreed upon:

(a) Counsel for the plaintiffs and the first and second defendants consented to the application of the third defendant for the additional grounds (encl 63). I gave order in terms accordingly.
(b) Counsel for the first, second and third defendants consented only to prayer 1 of the application of the plaintiffs as per encl 59.

I gave order in terms of prayer 1 only.

In respect of the withdrawal of the application for reamendment (encl 39) by Mr Sandhu with no objections from counsel for the first, second and third defendants and the consequential order that I made striking it out by consent, such an order was really unnecessary and in fact a duplication as on going through the record of the proceedings earlier on, encl 39 had, by consent, been struck out by me on 9 December 1989 with liberty to file. Hence the present application of the plaintiffs (encl 59).

In the event, the applications for hearing before me are:

(1) application by the first and second defendants (encl 17);
(2) application by the third defendants (encl 19 as amended);
(3) application by the plaintiffs in respect of prayers (2) and (3) in encl 59.

In respect of the application of the plaintiffs (encl 22) regarding injunction I will hear it depending on my ruling in respect of the applications of the first, second and third defendants. It was agreed by counsel for all the parties that the applications of the first, second and third defendants be heard together with the remaining prayers of the plaintiffs' application for reamendment in encl 59. Various affidavits were filed by the respective parties relating to their applications.

During the course of the hearing of the three applications, Mr Nijar, counsel for the plaintiffs, abandoned the following prayers: (a) the issue on the unconstitutionality of the amended s 90(B) of the Forest Ordinance as in prayer 5; and (b) the issue of illegality of contract between the first and second defendants as in prayer 10.

The salient facts

The plaintiffs are claiming on behalf of themselves and all other proprietors of native customary land situated at Kampong Uma Bawang, Baram, Sarawak that the third defendant through the Conservator of Forests of its agents/servants wrongfully granted timber licence no T/0191 to the second defendant for the taking of forest produce from certain portions of land which they claimed includes their native customary land.

The third defendant's predecessors on August 1951 vide LN No 881 (not 188) of 1951 issued a proclamation under s 29 of the then Forest Ordinance 1934 constituting the land enclosed within the boundaries described in the First Schedule thereof a protected forest known as Lemiting Protected Forest with effect from 15 September 1951 subject to the rights admitted, privileges conceded and special conditions governing the protection of the communities to farm their secondary forest ('temuda') as specified in the Second Schedule (see exh 'LC1' annexed to the affidavit of Leo Chai at encl 19).

The third defendant initially issued timber licence no T/0191 to Sarawak Timber Industry Development Corporation ('STIDC') on 1 June 1974 and the second defendant was the logging/marketing/processing contractor. When STIDC's licence expired in 1981, the second defendant applied for and was issued with timber licence no T/0191 on 18 April 1981, expiring on 31 May 1999 (see exh 'LC3'). The first defendant was appointed the logging contractor for the second defendant on 31 January 1987. The appointment of the first defendant as logging contractor was approved by the Director of Forests vide letter dated 24 September 1988 (see exh 'A' to encl 17). The timber licence no T/0191 covers the forest area in the Lemiting Protected Forest which the defendants claimed is state land.

The defendants asserted that the claim of the native customary land by the plaintiffs is confined to the secondary forests ('temuda') and so protected in the proclamation itself except that there is a restriction imposed on them not to clear high forest except with the authority of the Conservator of Forests, otherwise it shall be an offence. According to the defendants the extraction of timber has always been carried out within the Lemiting Protected Forest and over areas of virgin jungle and not over the secondary forest ('temuda') which the plaintiffs claimed to have native customary rights. The plaintiffs contended that the native customary rights acquired by them is not only confined to temuda land but relates as well to the whole of 'menoa' land. In other words by declaring what they claimed is their customary land as protected forests vide LN 881 of 1951 the third defendant has been able to grant rights to others over their customary land which will be against their rights over alleged customary land. According to the plaintiffs they came to know only around 1987 about their alleged customary land had actually been carried out for commercial purposes. It is interesting to note that as far back as the sixties the people of the Kampong Uma Bawang knew of the existence of the Lemiting Protected Forest. This is clearly shown by the

affidavit of Jok Jau Evong. According to exh JJE 6B to encl 57 para 2 reads:

> Sepertimana yang kami dahulunya, dengan pihak Jabatan Kerajaan tertentu dan juga dengan pihak Kerajaan Koloni dahulu, telah berunding dan bersepakat pada tahun enam pulohan, kawasan tersebut adalah diketepikan dari 'Lemiting Protected Forest' (LPF) dan ada beberapa 'plate' tanda khas Jabatan Hutan telah dilantak di pohon kayu di beberapa tempat strategik yang mana jadi tapak boundary di antara LPF dan NCR kami.

This letter acknowledges that the LPF is outside the native customary right ('NCR') land of the residents of Kampong Uma Bawang. However they now contend that NCR extends to 'menoa' land. Believing in their rights, the plaintiffs put up blockades or barricades across the logging road which cuts across their customary land resulting in arrests and being charged in court though the charges were subsequently withdrawn. The plaintiffs further alleged that the agreements giving consent to the first defendant to build roads and log ponds on their customary lands were not freely given and pressures were allegedly put by the first defendant or its servants for the agreements to be signed.

The law

Certain principles have been established through a number of authorities in an application under O 18 r 19 of RHC. Order 18 rule 19 reads:

> 19(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
> (b) it is scandalous, frivolous or vexatious; or
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
> (d) it is otherwise an abuse of the process of the Court;
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(a).
>
> (3) ...

No doubt para (2) would show that where the *only ground* on which the application is made is that the pleading discloses no reasonable cause of action no evidence including affidavit evidence is admissible (see *Wenlock* v *Moloney*[1]) but in an application on any other grounds as well as those mentioned in the rule or where the inherent jurisdiction of the court is invoked, affidavit evidence may be and ordinarily is used (see *The Supreme Court Practice 1988*, p 313).

The Privy Council in *Tractors (M) Bhd* v *Tio Chee Hing*[2] at p 1 said: 'the power to dismiss an action summarily without permitting the plaintiffs to proceed to trial is a drastic power. It should be exercised with the utmost caution.' Being a drastic power the summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable (see *A-G of Duchy of Lancaster* v *L & NW Ry Co*[3]). It would appear therefore that it is to be implied in plain and obvious cases where the action is one which cannot succeed or is in some way an abuse of the process or the case is unarguable (see *Nagle* v *Feilden*). It cannot be exercised by a minute and protracted examination of the documents and the facts of the case in order to see whether the plaintiff really has a cause of action (see *Wenlock* v *Moloney*[1]).

On the meaning of reasonable cause of action, Lord Pearson in *Drummond-Jackson* v *British Medical Association*[5] at p 692, said:

> No exact paraphrase can be given, but I think 'reasonable cause of action' means a cause of action with some chance of success, when (as required by r 19(2)) only the allegations in the pleadings are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out.

However, so long as the statement of claim or the particulars served under it (see *Davey* v *Bentinck*[6]) disclose *some* cause of action, or raise some question fit to be decided by trial, *the mere fact that a case is weak and not likely to succeed* is no ground for striking it out (see *Moore* v *Lawson*;[7] *Wenlock* v *Moloney*[1]).

It would appear to me that the first and second defendants are relying more on r 1(a), ie no reasonable cause of action, though r 1(b) and (d) were also cited therein and are further relying on the inherent powers of the court under O 92 r 4 which reads:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

The power to dismiss an action under the inherent jurisdiction of the court on the ground that it is obviously frivolous or vexatious is discretionary, just as it is under O 18 r 19. When application is made to the inherent jurisdiction of the court, all the facts can be gone into and affidavits as to the facts are admissible (see *The Supreme Court Practice 1988*, p 325).

The issues

From a perusal of the summons-in-chambers and the relevant affidavits filed and in view of the abandonment of their prayers 5 and 10 by the plaintiffs, the court would have to determine the following issues:

(i) whether this action should or can proceed or continue as a representative action by the plaintiffs;
(ii) whether the claims by the plaintiffs for the declaratory orders have been barred by any law relating to limitation or whether their claims, if any, have been defeated by laches or acquiescence;

(iii) whether on the basis of the pleadings and the affidavits filed, the plaintiffs have any cause of action against the defendants.

Issue (i):

Representative action is provided under O 15 r 12 of RHC and the relevant paras of r 12 for the present applications are paras (1) and (2) which read:

> 12(1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
>
> (2) At any stage of proceedings under this rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this paragraph, the Court appoints a person named as a defendant, it shall make an order under rule 6 adding that person as a defendant.

The plaintiffs by their application (encl 59) seek to reamend their amended writ of summons and amended statement of claim (encl 4), so I understand, to be in line with the title in the writ thus fully indicating the representative action of the plaintiffs. *The Supreme Court Practice 1988* (Vol 1) at p 212 stated as follows:

> Under Order 6 rule 3, the representative capacity of the plaintiffs or defendants must be indorsed on the writ of summons (see *Re Royle* (1877) 5 Ch D 540). The representative capacity of the plaintiffs or defendants ought also to be stated in the title of the writ and of the statement of claim (*Re Tottenham* [1896] 1 Ch 628) and it is desirable that it should also be stated in the body of the statement of claim and in the prayer.

It would seem clear to me from the application of the plaintiffs (encl 59) that its object is to put their representative action in a proper frame as stated in the above quoted passage and therefore I do not see the real objection to the plaintiffs' application by the defendants. In my view the granting of the application of the plaintiffs for reamendment will not in anyway prejudice or embarrass the defendants' application as is borne out by the submissions of counsel for the defendants, that is, whether the representative action of the plaintiffs satisfies the provisions of O 15 r 12 of RHC. Be that as it may the defendants seek to have the amended writ and amended statement of claim struck out on the ground that the action was not properly constituted as a representative action as it was not one that fell within the ambit of O 15 r 12(1) of RHC. The issue for determination is whether there are numerous persons having the same interest in the present proceedings.

The representative proceedings under O 15 r 12 of our RHC is similar to the English provision (also O 15 r 12). Sir Raymond Evershed MR in *Smith* v *Cardiff Corp*[8] at p 1376 quoted with approval the qualifications in the dictum of Lord MacNaughten in *Bedford (Duke)* v *Ellis*[9] regarding representative proceedings as follows:

> If the persons named as plaintiffs are members of a class having a common interest, and if the alleged rights of the class are being denied or ignored, it does not matter in the least that the nominal plaintiffs may have been wronged or inconvenienced in their individual capacity ... Given a common interest and a common grievance, a representative suit was in order if the relief was in its nature beneficial to all whom the plaintiffs proposed to represent.

Lord Evershed MR said at pp 1376-1377 'it must be shown, first, that all the members of the alleged class have a common interest, that all have a common grievance, and that the relief is in its nature beneficial to them all.'

It is then pertinent for me to examine whether the qualifications have been satisfied in this case for it to be allowed to proceed as representative proceedings.

I think it is not disputed that the plaintiffs purported to represent a community called Kayans and they are residents of Kampong Uma Bawang. However from the affidavits it is equally not disputed that there appears to be two factions in this community, one group led by plaintiffs through the Uma Bawang Action Committee and the other group led by the Tua Kampong who aligned themselves with the defendants. I would not give much consideration to the submission of counsel for the defendants on the use of the word 'proprietors' by the plaintiffs as I am of the view that such word is a misnomer. I think for want of a better word, 'proprietors' was used and used rather loosely. Be that as it may, in the present action the plaintiffs are claiming alleged native customary rights over the land under the proclamation declared by the third defendant's predecessor. The question is whether native customary land is recognized by the law in the first place. It would appear to be so as under s 2 of the Land Code (Cap 81). 'Native Customary Land' means:

> (a) land in which native customary rights, *whether communal or otherwise*, have lawfully been created prior to 1 January 1958, and still subsist as such;
> (b) land from time to time comprised in a reserve to which s 6 applies; and
> (c) Interior Area Land upon which native customary rights have been lawfully created pursuant to a permit under s 10; (emphasis added).

For the present case, I think the plaintiffs are relying on (a) above. The plaintiffs filed this action as a representative of the Kayan community there and Kayan is a native race specified in the schedule to the Interpretation Ordinance. As such it would appear that native customary rights whether communal or otherwise are recognized by the law, ie the Land Code of Sarawak (Cap 81) (see ss 5 and 15 of the Land Code). In other words if native customary rights were established as at 1 January 1958 such rights

shall subsist. The plaintiffs, in that event, would have satisfied the qualification as to common interest, ie native customary right. In respect of common grievance, it would seem clear to me that by the proclamation the Kayan as a community would be deprived of their alleged native customary rights over the land proclaimed. In the result if the relief claimed is successful the Kayan as a community will continue to have the benefits of their native customary rights even to the extent of entitlement to grant in perpetuity for agricultural purposes free of premium, rent and other charges under s 18 of the Land Code. Even though native customary lands shall continue to be state land, where no document of title has been issued in respect thereof, any native lawfully in occupation thereof shall be deemed to hold by licence from the government and are not required to pay any rent as provided under s 5(2) of the Land Code. Section 15 of the Land Code provides protection of native customary rights where one of the provisions is for payment of compensation to the persons entitled to such rights.

Section 15(1) reads:

> Without prejudice to section 18, state land shall not be alienated until all customary rights therein have been surrendered or extinguished or provision has been made for compensating the persons entitled to such rights.

Given the relevant provisions of the Land Code, if any member of the Kayan community can establish their native customary rights then such rights, in my view, are adequately protected by the law and if they can show or prove infringement of their native customary rights then the Kayan natives having such rights will have such benefits if the relief claimed is successful. At the risk of being repetitive, the dictum of Lord McNaughten in *Bedford*'s case,[9] is relevant when he said:

> .. if the alleged rights of the class are being denied or ignored, it does not matter in the least that the nominal plaintiffs may have been wronged or inconvenienced in their individual capacity ... Given a common interest and a common grievance, a representative suit was in order if the relief was in its nature beneficial to all whom the plaintiffs proposed to represent.

Though perhaps the rights of an individual may be affected but such rights depend on whether native customary rights can and are established over the Lemiting Protected Forests as such and therefore provides, in my view, the common interest in this case.

In respect of Mr Fong's submission that there were two factions and therefore the plaintiffs cannot claim to represent all of the residents of Kampong Uma Bawang, I think, the case of *John* v *Rees*[10] may provide the answer where Megarry J said at p 284:

> The artificial nature of the process is shown by the fact that, as Fletcher Moulton LJ pointed out in *Markt & Co* v *Knight Steamship Co Ltd* [1910] 2 KB 1039, a plaintiff suing in a representative capacity does not have to obtain the consent of those whom he purports to represent, and they are not liable for costs, though by estoppel or res judicata they will be bound by the result of the case.

Subject to the divisions in opinion between the two factions, the plaintiffs and those they purportedly to represent, all have common interest and as common grievance and seek relief beneficial to all they proposed to represent if they are successful in their action.

Mr Fong urged the court to exercise its discretion by relying on *J Bollinger SA* v *Goldwell*[11] where even if 'the common interest test' is satisfied the court still has a discretion to strike out the writ where a representative action cannot be brought unless the whole of a claim is appropriate to that form of action. On the issue of trespass raised by Mr Fong, in my view, this issue is related to the claim of the plaintiffs in respect of their native customary rights and in which event it cannot be said that the whole of the claim is not appropriate to the form of action filed therein. In my view this is a proper case where I should exercise my discretion in favour of the plaintiffs as I am satisfied that the essential qualification of a representative action that the persons who are to be represented and the persons representing them have the same interest in the same proceeding as envisaged by O 15 r 12 of RHC have been satisfied.

Issue (ii):

It is best that I consider the issue on limitation, laches or acquiescence first as even assuming that there is a reasonable cause of action against the defendants, if the defendants succeed on this ground alone then there is no necessity to consider the issue of reasonable cause of action.

In this case the defendants have not delivered their defence yet pleading the statute of limitation as a defence specifically. Though this would appear to be the practice and the observation made in the case of *Dismore* v *Milton*,[12] the Court of Appeal in *Riches* v *DPP*[13] considered that the observation in *Dismore* v *Milton*[12] went too far. It held, not following *Dismore*'s case,[12] that where it was clear that the defendant was going to rely on the statutes of limitations and there was nothing before the court to suggest that the plaintiffs could escape from it, the claim would be struck out. His Lordship Davies LJ in his judgment at p 939 said:

> In the light of those more recent authorities, I think, as I say, that perhaps the observations of this court in *Dismore* v *Milton* [1938] 3 All ER 762 went too far. I do not want to state definitely that, in a case where it is merely alleged that the statement of claim discloses no reasonable cause of action, the limitation objection should or could prevail. In principle I cannot see why not. If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitations and must fail.

In so far as the timber licence was concerned, it was first issued by the Director of Forests to STIDC in 1974 and later in 1981 to the second defendant. The proclamation of the Lemiting Protected Forest was issued in 1951. It is clear that the act of issuing the proclamation and the issue of the timber licence were acts done by public officers pursuant to written law or in the execution of their public duty. In that event, any action taken to challenge such action must necessarily be commenced within 36 months next after the act complained of, ie the proclamation made in respect of the Lemiting Protected Forest or the issue of the timber licence. (See s 2 of the Public Authorities Protection Act 1948 and *Saw Seng Kee* v *Director of Lands and Mines, Penang*.[14]) Equally clear, in my view, is that no attempt was made by the plaintiffs to enforce any legal rights over the alleged area for the alleged acts of dispossession until the present suit was filed and s 2(a) of the Public Authorities Protection Act 1948 would seem to show that the action of the plaintiffs is statute-barred and the court cannot accordingly take cognizance of their claim (see *Ara bte Aman & Ors* v *Superintendent of Lands and Mines 2nd Div*[15] and *Tio Chee Hing & Ors* v *Govt of Sabah*[16]).

Further the Federal Court in *Haji Hussin bin Hj Ali & Ors* v *Datuk Hj Mohamed bin Yaacob & Ors*[17] at p 232 noted regarding the delay in filing the suit for services terminated as follows:

> We note that these subsequent suits were filed approximately 43 months, 46 months and 45 months respectively after the letter terminating the appellants' services were sent to them, and therefore well after the three year limit prescribed by s 2(a) of the Public Authorities Protection Act 1948.

Further on the same page, the Federal Court held as follows:

> Now the granting of a declaratory judgment is a matter purely at the discretion of the court. We do not think that the circumstances surrounding the present appeals would justify our exercising this discretion in favour of the appellant where there has been, in our view, unreasonable vacillation and delay. We set down hereunder a passage from p 191 of *The Declaratory Judgment* by Zamir:
>
> 'This discretion is employed, as discretion was originally employed in respect of all equitable remedies, primarily to do justice in the particular case before the court. It is wide enough to allow the court to take into account virtually all objections and defences possible in equitable proceedings. Thus, for instance, in one declaratory action the court took into consideration the motives of the plaintiff in bringing the action (*Everett* v *Griffiths* [1924] 1 KB 759, 767) the court held that the plaintiff had waived his right to take the proceedings and, further assumed that the claim might also be dismissed on the ground of undue delay ('laches') (Limitation Act 1939).'

Here no reasons were given by the plaintiffs for the delay in their action except that they only came to know of the infringement of their rights when the first defendant started the work in 1987. It should be noted, however, that the affidavit of Jok Jau Evong (encl 57), exh JJE 6B would seem to show that the plaintiffs were aware of the proclamation as far back as the sixties and they did not challenge the validity of the proclamation then. To challenge the validity of the proclamation of Lemiting Protected Forest now, in my view, is a bit too late at this point of time. If the plaintiffs sleep on their rights, then they take the risks that their rights may be extinguished.

In the circumstances there was nothing to suggest that the plaintiffs can escape from the provisions of s 2(a) of the Public Authorities Protection Act 1948. If the plaintiffs' action against the third defendant is statute-barred it follows therefore that the action against the first and the second defendants must also necessarily fail as the proclamation and the timber licence are deemed to be valid. In that event there is no necessity for me to consider the issue of reasonable cause of action, if any.

The issue of trespass is applicable as against the first defendant only. This is in respect of the use of the temuda land (not included in the Forest Licence No T/0191) for the construction of logging roads and log ponds. From the various affidavits filed it would show that the first defendant was allowed onto the temuda land and if that is so, there is no question of trespassing. The fact that the agreement may be illegal is irrelevant to the issue whether the entry onto the temuda land of the plaintiffs or those they claim to represent was with or without justification or lawful authority of the owners. The issue of trespass may be applicable only if I hold that there are issues that ought to go for trial in respect of the plaintiffs' native customary rights over the Lemiting Protected Forest. Here, I am of the view that the plaintiffs' claim for declarations that the Lemiting Protected Forest and the timber licence are invalid is statute-bared.

In the result I would allow the applications of all the defendants and dismiss the plaintiffs' action with costs to be taxed unless agreed. In view of my judgment I make no order as to the plaintiffs' application for reamendment as in encl 59.

Applications allowed.

Solicitors: *MS Sandhu & Co; Reddi & Co.*

Reported by *Zarinah Marican*